Supreme Court, U.S.
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No. 99-62

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next friend for her minor Children, Jane and John Doe, Minor Children; Jane Doe #2, Individually and as next friend for her minor child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This Statement of Case is somewhat restricted in that it essentially addresses misstatements found in the Petitioner's Statement of the Case. The Respondents, Jane Does, each mothers of school age children, brought suit in the district court below complaining with respect to certain practices of the Petitioner school district. These practices included the Petitioner, Santa Fe Independent School District ("SFISD"), allowing students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games. *Jane Doe, et al. v. Santa Fe Indep. School Dist.*, 168 F.3d 806, 810 (5th Cir. 1999). The prayers were delivered as "invocations" or "benedictions" for these events, and typically were given by officers of the student council. *Id.* SFISD maintained complete control over the programs and facilities during the reading of the prayers, including the ability to mute the microphone or remove the speaker. *Id.* Furthermore, the text of the graduation invocations and benedictions was screened by SFISD for content prior to the ceremony. *Id.*

The first misstatement found in Petitioner's Statement of the Case is seen in the following statement to this Court, "[t]he questions presented here arise from the Respondents' complaints that two of Santa Fe ISD's policies permitted religious content in speech by students at certain school events." Petition for Certiorari at p. 2. The statement is incorrect in that Respondents filed suit in the district court below with respect to the actual practices of the district. The school district developed the policies at issue only after the district court ordered the Petitioner to "finalize a unified First Amendment religion/expression

policy addressing all issues." *Jane Doe, et al. v. Santa Fe Indep. School Dist., supra* at 812.

In response to the court's order, SFISD presented graduation and football prayer policies that were two-tier: the first-tier was to allow prayer with no requirement that the prayer be "nonsectarian and nonproselytizing." The second-tier, or the fall back position, was one that was to take effect if the district court was to reject their desire to have prayer that was nonsectarian and nonproselytizing. If the district court would reject the first-tier, then and only then, the district would insert the words "nonsectarian" and "nonproselytizing" in their graduation and football policies. It is clear that the district policies were directed at the Fifth Circuit's previous ruling in *Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) ("*Clear Creek II*").

Curiously, the Petitioner omits from its Statement of Facts all of the Fifth Circuit's findings as to the historical context in which the district adopted their policies and the district's intent in developing those policies, when in fact many of the Fifth Circuit's holdings were based on these findings. For example, in analyzing the secular purpose prong of the *Lemon* test, the Fifth Circuit found the school district's true intent was to encourage sectarian and proselytizing prayers. The court correctly concluded that the district's two-tier policies could only be found to be an "attempt to encourage sectarian and proselytizing prayers – a purpose which is the antithesis of secular." *Jane Doe, et al. v. Santa Fe Indep. School Dist., supra* at 816. The court also stated, "Our cynicism about

the school board's proffered secular purpose is galvanized by SFISD's inclusion of the fall-back alternative that would re-insert the twin restrictions ipso facto should the district court invalidate the basic provision of the July policy." *Id.* at 817.

The Fifth Circuit also looked to the intent of the school district as it related to whether it had created a public forum at graduation or football games:

> SFISD attempts to evade the requirements of the Establishment Clause by running for the protective cover of a designated public forum. We must, therefore, view skeptically SFISD's own self-serving assertion of its intent and examine closely the relationship between the objective nature of the venue and its compatibility with expressive activity.

Id. at 820.

Similarly, in reviewing the practices of the district and the context in which their policies were developed, the court found that, "[t]he context of the evolutionary history in which SFISD developed its series of prayer policies further confirms the school district's penumbral religious purpose." *Id.* at 816. Furthermore, the Fifth Circuit characterized the Respondents' proof in the district court as: "evidence that the Does were able to accumulate covered a wide variety of disturbing incidents and practices." *Id.* at 809-810. The Fifth Circuit also took note of the attempts by SFISD administrators, teachers, and other employees "overtly or covertly to ferret out the identities of the Plaintiffs . . . by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping.' " *Id.* at 809, n.1.

The Petitioner also misstates what and why the Fifth Circuit rejected its attempt at structuring a football prayer policy. On page 5 of the Petitioner's Petition for Certiorari the following is found:

> The Fifth Circuit held that this policy violates the Establishment Clause because it permits prayer at a school-sponsored athletic event before a "government-organized audience."

In fact, the Fifth Circuit was far more restrictive and quite clear in its rejection of the school district's policies:

> Thus, as we indicated in *Duncanville* [70 F.3d 402 (5th Cir. 1995)], our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We, therefore reverse the district court's holding that SFISD's alternative Clear Creek Prayer Policy can be extended to football games.

Id. at 823.

And finally the Respondent overstates the Fifth Circuit's ruling when it submits, "[t]he court further held, however, that no student prayers are permitted at other school-sponsored functions and that Santa Fe ISD's football game student speech policy violated the Establishment Clause because it theoretically allowed prayer as one of the types of speech a student might deliver." Petition for Certiorari at p. 3. The statement is incorrect in that this issue was never broached in the trial court below. The only policy that was presented by the Petitioner to the district court was that of football and graduation ceremonies. The application of this distinction is

seen when the Petitioner seeks to have this Court review "other school functions" in the Questions Presented (Question 1), when the record is silent as to any other policy being subjected to review.

ARGUMENT

REASONS FOR DENYING THE WRIT

The school district's petition for certiorari in this case rests on two flawed premises. First, the school district argues that the decision below demonstrates a conflict among the circuits on the constitutional rules governing student-led and student-initiated prayer at public school graduation ceremonies and football games. Second, the school district argues that the Fifth Circuit's reference to overtly sectarian and proselytizing prayer at either graduation or football games is inconsistent with this Court's Establishment Clause jurisprudence. Neither claim has merit; neither warrants plenary review.

I. PETITIONER MISCHARACTERIZES THE RELEVANT LOWER COURT DECISIONS.

The school district's assertion of a circuit conflict rests principally on the Eleventh Circuit's recent decision in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999). While hardly a model of clarity, *Chandler* does not go nearly as far as Petitioner suggests in allowing school prayer so long as it is student run and student initiated.

At the outset, it is important to note that the district court in *Chandler* struck down an Alabama statute permitting nonsectarian, nonproselytizing student-initiated prayer, invocations and benedictions during compulsory or non-compulsory school-related assemblies, sporting events, graduation ceremonies and other school-sponsored events. *Chandler, supra* at 1256. The Eleventh Circuit's ruling on the constitutionality of the statute was not appealed and is entirely consistent with the Fifth Circuit's approach in football games and hardly supports the school district's contention in the case that students should be allowed to engage even in sectarian and proselytizing prayer at graduation.

The issue that was appealed to the Eleventh Circuit in *Chandler* was whether the district court's injunction represented an appropriate remedy for the uncontested (on appeal) constitutional violations. The Eleventh Circuit's decision vacating the injunction was based on its highly debatable conclusion that the injunction prohibited all student prayer in school (including, for example, a student's whispered prayer prior to a math exam). Even so, the Eleventh Circuit agreed with the Fifth Circuit that "[p]roselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit." *Id.* at 1265.

Petitioner also cites *Adler v. Duval County School Board*, 174 F.3d 1236 (11th Cir. 1999), where an Eleventh Circuit panel declared unconstitutional a school policy that permitted graduating seniors to select a class speaker who was then free to deliver a prayer at graduation. However, that decision has since been vacated and the case has been scheduled for rehearing en banc. *Adler v. Duval County School Board*, 1999 U.S. App. LEXIS 13190 (11th Cir. June 3, 1999). Likewise, Petitioner relies on the Ninth Circuit decision in *Doe v. Madison School District*, 147 F.3d 832 (9th Cir. 1998), which was vacated as moot following remand from this Court. *Doe v. Madison School District*, 177 F.3d 789 (9th Cir. 1999). Vacated decisions do not create a circuit conflict.

II. THE FIFTH CIRCUIT CORRECTLY REJECTED THE SCHOOL DISTRICT'S POSITION THAT THE CONSTITUTION PERMITS OVERTLY SECTARIAN PRAYER AT SCHOOL-SPONSORED FUNCTIONS.

The school district in this case challenges the Fifth Circuit's holding that the use of the public address system for "student-initiated" prayers prior to football games is unconstitutional even if the prayer is nonsectarian and nonproselytizing, while student-initiated prayer at graduation ceremonies is constitutional only if it is nonsectarian and nonproselytizing.

Petitioner describes the holding as inconsistent, and it may well be. Throughout this litigation, Respondents have made clear their disagreement with the Fifth Circuit's rule, first announced in *Jones v. Clear Creek Independent School District, supra*, that student-initiated graduation prayer is constitutional so long as it is nonsectarian and nonproselytizing. However, Petitioner does not seek a reaffirmation of *Clear Creek II*. Petitioner challenges *Clear Creek II* because it does not go far enough, because it does not permit students to engage in overtly

sectarian prayer at graduation ceremonies. The Fifth Circuit properly rejected that view, which is plainly inconsistent with this Court's Establishment Clause jurisprudence.

In recent cases, the Court has emphasized that one of the important functions of the Establishment Clause is to ensure that individuals not be made to feel like outsiders in their own community because of their religious views. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 628 (1989) (O'Connor, J., concurring). This Court has also recognized that school children are especially vulnerable to such feelings because they are inherently susceptible to peer pressure, and that it is inherently coercive to put graduating seniors in the position of submitting to that pressure or skipping graduation. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992). The fact that graduation prayer (or prayer before football games) is led by students, does not diminish the pressure to religious conformity, if anything, it may increase it. And the fact that a prayer is overtly sectarian only magnifies the message that there is one truth faith.

As the Fifth Circuit correctly perceived, therefore, this case is not about speech in a genuine public forum. *Jane Doe, et al. v. Santa Fe Indep. School Dist., supra* at 819-821. It is about a school policy deliberately designed to circumvent *Lee* through the use of student surrogates to deliver prayers before a captive audience that school officials can no longer deliver themselves. The effect of such a policy, at the very least, is to promote religion in violation of the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As a result, it is not surprising that

Petitioner cannot point to a single case that goes as far as they now ask this Court to go.

There is no reason to grant certiorari in this matter.

CONCLUSION

For these reasons, the Respondents request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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